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# In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT O'NEAL, PETITIONER

v.

FRED MCANINCH, WARDEN

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR TIMOTHY SCOTT SHERMAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the prosecution bears the burden of showing on collateral review that a constitutional error in a criminal trial was harmless.

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## BRIEF FOR TIMOTHY SCOTT SHERMAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICUS CURIAE

Timothy Scott Sherman was convicted in Maryland state court in 1988 of two counts of first-degree murder and was sentenced to consecutive terms of life imprisonment. His trial, however, was tainted by an error of constitutional magnitude: during the trial, one of the jurors conducted his own unsupervised inspection of the crime scene and of a "key" piece of evidence in the case: a pine tree in which the murder weapon was found. *Sherman* v. *Smith*, 1993 WL 433317, *2 (4th Cir. Oct. 27, 1993) (unpublished).

On direct appeal, the state courts failed to recognize the constitutional dimension of the juror site visit, and thus

erroneously required Mr. Sherman to establish prejudice rather than requiring the State to prove beyond a reasonable doubt that the constitutional error was harmless. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). This Court denied a petition for certiorari, but two Justices recorded dissents from the denial. *Sherman* v. *Maryland*, 498 U.S. 950 (1990). Mr. Sherman then filed a habeas corpus petition in federal district court.

The district court denied the petition, but the Fourth Circuit vacated and remanded, directing the district court to determine whether the admitted constitutional violation was structural error or trial error, and, if trial error, whether the error could be deemed harmless. 1993 WL 433317, *4. In doing so, the Fourth Circuit ruled that, under *Brecht* v. *Abrahamson*, 113 S. Ct. 1710 (1993), and *Kotteakos* v. *United States*, 328 U.S. 750 (1946), the burden is on the State to show that the trial error was harmless. 1993 WL 433317, *4.

The disposition of Mr. Sherman's habeas petition, which is currently pending in the district court on remand from the Fourth Circuit, could be affected by the Court's ruling in this case. Mr. Sherman therefore has an interest in preserving the ruling of the Fourth Circuit by supporting reversal of the contrary decision below in this case.[1]

## INTRODUCTION AND SUMMARY OF ARGUMENT

The long history of harmless-error jurisprudence, both in England and in America, has seen many doctrinal shifts, but one principle has remained clear throughout: once a party establishes that his trial was infected with error, it is his adversary — as the beneficiary of the error — who must bear the burden of demonstrating that the error was harmless. The

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.



sole exception to that principle has been that a party asserting a merely "technical" error relating to the etiquette or procedural minutiae of a trial must demonstrate that the technical error caused harmful effects.

This Court has adhered to the traditional dichotomy between "technical" errors and errors that, by their nature, tend to affect substantial rights. Furthermore, this Court's precedents indicate that a trial error of constitutional dimension can never be deemed a trifling "technical" error. The rights protected by the Constitution are inextricably intertwined not only with the most basic standards of liberty and due process, but also with the reliability of the jury's determination of guilt or innocence. Judgments in cases where constitutional protections were violated are inherently suspect. For this reason, it has always fallen to the party seeking to justify such judgments to demonstrate that the constitutional error was harmless.

The same principle has held true on both direct and collateral review of criminal convictions. See *Chapman* v. *California*, 386 U.S. at 24 (State bears the burden of showing that a constitutional error was harmless on direct review); *Yates* v. *Evatt*, 500 U.S. 391, 407-411 (1991) (State bears the burden of showing that a constitutional error was harmless on collateral review); *Rose* v. *Clark*, 478 U.S. 570, 583-584 (1986) (same); *Milton* v. *Wainwright*, 407 U.S. 371, 377-378 (1972) (same). The court below, however, inverted the historic harmless-error analysis by placing *on the defendant* the burden of proving not only that a constitutional error occurred, but also that the error prejudiced or influenced the verdict against him. *O'Neal* v. *Morris*, 3 F.3d 143, 145 (6th Cir. 1993).

The holding below misinterprets this Court's recent decision in *Brecht*, which explicitly adopted the *Kotteakos* harmless-error analysis, which in turn applied the traditional rule that the beneficiary of a non-technical error must prove

that the error was harmless. The decision below also collapses the longstanding distinction between technical and constitutional errors. Consequently, this Court should reverse the decision below and reaffirm the bedrock principle that the State bears the burden of showing — even under the relaxed harmlessness standard applicable on collateral review — that a constitutional error was harmless.

## ARGUMENT

### THE STATE BEARS THE BURDEN IN HABEAS CORPUS CASES OF SHOWING THAT A CONSTITUTIONAL ERROR WAS HARMLESS

"Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean." *Chapman* v. *California*, 386 U.S. at 21; accord *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) (per curiam) ("The final decision [in a habeas case] whether the alleged constitutional error was harmless is one of federal law.").

Until 1993, it was generally accepted that the question of harmlessness, because it is a question of federal law, would be resolved under exactly the same standards in a habeas case as in a direct appeal from a federal conviction or in a case arising in this Court on direct review of a state conviction. See *Brecht*, 113 S. Ct. at 1718 ("we have applied the *Chapman* standard in a handful of federal habeas cases"). The Court in 1993, however, decided that a different standard was appropriate for habeas cases (and of course we do not quarrel with that determination). But the important point for present purposes is that, in setting a new standard, the Court did not simply invent a new approach. Rather, it borrowed an *established* approach from another context, *i.e.*, the review of *nonconstitutional* errors on direct federal review. See *Kotteakos* v. *United States*, *supra*; *Brecht*, 113 S. Ct. at 1722 ("The *Kotteakos* standard, we believe, fills the bill.").



Rather than send the federal courts into uncharted territory, the Court believed it important that, "because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U.S.C. § 2111), federal courts may turn to an existing body of case law in applying it." 113 S. Ct. at 1722.

History, then, is the most important guidepost for this Court in resolving the allocation-of-burden issue presented in this case. As we will now demonstrate, the burden of showing the harmlessness of a constitutional error has *always* rested on the prosecution. Even for nonconstitutional errors, *Kotteakos* itself places the burden on the prosecution. 328 U.S. at 760-761; see *Brecht*, 113 S. Ct. at 1723-1724 & n.1 (Stevens, J., concurring). Only by inventing a new approach out of whole cloth for habeas cases could this Court place the burden on a habeas petitioner to *disprove* harmlessness.[2]

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[2] By this statement, we mean no disrespect to the Chief Justice's passing statement, in the opinion for the Court in *Brecht*, 113 S. Ct. at 1722 (emphasis added), that "habeas petitioners * * * are not entitled to habeas relief based on trial error unless *they* can establish that it resulted in 'actual prejudice.'" We mean simply that the allocation-of-burden issue was not before the Court in *Brecht*, so the quoted statement cannot be taken as authoritative. As *Brecht* itself reminds us, when the Court has "never squarely addressed [an] issue," but has "at most assumed the applicability" of a particular standard, the Court in a later case is "free to address the issue on the merits." *Id.* at 1718; accord, *e.g.*, *Daniels* v. *Williams*, 474 U.S. 327, 330-331 (1986) (overruling preliminary remark in prior case while adhering to core holding of that case). Certainly, the quoted statement in *Brecht* cannot be taken as an authoritative holding when only five Justices joined the majority opinion and one of those five Justices expressly joined on the premise that the standard the Court was adopting "places the burden on prosecutors to explain why * * * errors were harmless." 113 S. Ct. at 1723 (Stevens, J., concurring).

## I. THE HARMLESS-ERROR DOCTRINE HAS TRADITIONALLY ALLOCATED TO THE BENEFICIARY OF A TRIAL ERROR THE BURDEN OF SHOWING THAT THE ERROR WAS HARMLESS

1. Dean Wigmore has traced the application of the harmless-error doctrine in criminal cases back to the 1700s. 1 WIGMORE ON EVIDENCE § 21, at 884-885 (Tillers rev. 1983). The early cases do not clearly indicate which party bore the burden of showing the effect of an error. In *Tinkler's Case*, Russ. & Ry. 133, 133 n. (Cr. Cas. Res. 1781), the court upheld a conviction despite the introduction of improper evidence on the ground that "ample" evidence supported the verdict; see also *Rex* v. *Ball*, Russ. & Ry. 132, 168 Eng. Rep. 721 (Cr. Cas. Res. 1807) (guilty verdict can be sustained despite trial error where the "weight of the evidence" left the court with "no doubt of the guilt of the prisoner"). Those cases did suggest, however, that the courts looked to whether the prosecution, which of course bore the burden of proof at trial, had adduced evidence sufficient to overcome the taint of the error.

The nature of harmless-error review changed radically in the 1830s, when, following the lead of the Court of Exchequer decision in *Crease* v. *Barrett*, 1 C.M. & R. 919, 149 Eng. Rep. 1353, 1359 (Ex. 1835), the rule in England came to be that virtually any error in a criminal case required acquittal on appeal, and any error in civil cases required a new trial. *Regina* v. *Gibson*, 16 Cox Cr. Ca. 181, 18 Q.B.D. 537, 541 (1887) (Coleridge, C.J.). The only burden on the appellant was to establish that an error had occurred. The rationale for this rule was that judicial weighing of evidence to ascertain the effect of an error on the verdict would usurp the jury's role as factfinder. 1 WIGMORE, *supra*, § 21, at 889. This "Exchequer rule" found widespread acceptance in the United States courts. *Id.* at 888-889; R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13



(1970); *Ninth Annual Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 2 A.B.A.J. 603, 605 (1916) (*Special Committee Report*). Thus, this Court stated in *Waldron* v. *Waldron*, 156 U.S. 361, 380 (1895), that "[i]t is elementary that the admission of illegal evidence, over objection, necessitates reversal."

2. Although the "Exchequer rule" of harmless error was repudiated in England by the Judicature Act of 1873 (36 & 37 Vict., c. 66, rule 6, sched. 1),[3] it continued to be applied in the United States into the 1900s. The rule came under attack, however, as its "lamentable" results (1 WIGMORE, *supra*, § 21, at 891) became clear: too many criminal convictions were being reversed for "technicalities" that bore no relation to the defendants' substantial rights or to the merits of the cases. Wigmore, *Criminal Procedure: "Good" Reversals and "Bad" Reversals*, 4 ILL. L. REV. 352, 354 (1909); *Special Committee Report* at 606; Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP., Pt. 1, 395 (1906). For example, in *People* v. *St. Clair*, 56 Cal. 406 (1880), the court overturned a larceny conviction on appeal because the letter "n" was omitted in the word "larceny" in the indictment; the court reasoned that there was no such crime as "larcey."[4]

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[3] By its terms, the Judicature Act applied only to civil actions. But, despite that limitation, criminal courts in England also abandoned the "Exchequer rule" in favor of an inquiry into the strength of the prosecution's case against the defendant. 1 WIGMORE, *supra*, § 21, at 898 n.17.

[4] Similarly, in *Williams* v. *State*, 27 Wis. 402 (1871), the court reversed a conviction because the indictment stated that the offense was "against the peace of the State" instead of "against the peace *and dignity* of the State" (quoted in R. TRAYNOR, *supra*, at 85 n.3).

In response to the perception that appellate courts had become "impregnable citadels of technicality" (Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925)), and after "long agitation under distinguished professional sponsorship" (*Kotteakos*, 328 U.S. at 758), Congress enacted legislation designed to prevent reversals based solely on technical grounds. The Act of February 26, 1919, codified at the time of *Kotteakos* as 28 U.S.C. § 391 (now slightly reworded as 28 U.S.C. § 2111), provided that on appeal of any case, civil or criminal,

> the court shall give judgment after an examination of the entire record before the court, *without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties*. [Emphasis added.]

The wording of the statute expressly adopts the traditional distinction between technical errors and errors affecting substantial rights.

Significantly, Congress did *not* intend to weaken the vital role of appellate courts in protecting criminal defendants whose trials were tainted by errors that implicated substantial rights. To that purpose, the legislative history "stated authoritatively" that the party seeking to uphold a tainted verdict must bear the burden of proving that the error was harmless unless the error complained of was merely "technical" in nature:

> The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, *the burden of sustaining a verdict will, notwithstanding this legislation[,] rest upon the one who claims under it*.



*Kotteakos*, 328 U.S. at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)) (emphasis added). The legislative history also shows that the bill "went through many revisions, largely at the instance of the Senate, because there was fear of too easy relaxation of historic securities thrown around the citizen charged with crime." *Kotteakos*, 328 U.S. at 762 (footnote omitted). Thus, it is clear that, under former Section 391, the burden of showing that an error affecting the "historic securities" that safeguard criminal defendants was harmless remained with the prosecution.

3. This Court has on several occasions confirmed that the prosecution bears the burden of proving that non-technical trial errors were harmless. In *Bruno* v. *United States*, 308 U.S. 287 (1939), the Court reversed a conviction for conspiracy to violate the narcotics laws because the trial court had erroneously refused to include a requested instruction in the jury charge. Justice Frankfurter, writing for the Court, ruled that the error was not "technical" because the requested instruction — telling the jury that a defendant's decision not to testify does not create any presumption against him — reflected a statutory right granted to criminal defendants by Congress. 308 U.S. at 292-293. Although the Court declined to provide an "abstract, inclusive definition of 'technical errors,'" it relied on "what every student of the history behind the Act of February 26, 1919, knows, that *that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure* from touching the merits of a verdict." *Id.* at 293-294 (emphasis added). Similarly, in *Weiler* v. *United States*, 323 U.S. 606, 611 (1944), the Court reversed a perjury conviction on the ground that the trial court's refusal to instruct the jury on a common law rule relating to perjury was more than a "technical" error.

The crucial point of *Bruno* and *Weiler* is that violations of a right conferred by a federal statute in the one case, and of a common law right in the other, were held not to be

"technical" errors. It follows *a fortiori* that a right protected by the Constitution itself also cannot be considered "technical" and that, consequently, the burden should stay with the prosecution to show that trial errors affecting constitutional rights were harmless.

## II. THIS COURT'S DECISIONS IN *KOTTEAKOS* AND *CHAPMAN* CONFIRM THAT THE PROSECUTION MUST BEAR THE BURDEN OF SHOWING THAT A CONSTITUTIONAL ERROR WAS HARMLESS

1. In *Kotteakos* v. *United States*, the Court provided a searching and comprehensive interpretation of the federal harmless-error statute. Construing the language of former Section 391, the Court held that reversals for trial errors should occur only if the errors "had [a] substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776. The Court discussed at length which party bears the burden of proving harmlessness under this standard. Relying on the statute's legislative history and the circumstances surrounding its enactment, the Court squarely placed the burden on the prosecution to prove that non-technical trial errors were harmless. *Id.* at 765. In so doing, the Court adhered to the historic principle of requiring the party seeking to uphold a verdict to show that any non-technical error was harmless, and of resolving all doubts in favor of the party who has, by definition, already proved that such an error infected his trial. Furthermore, the Court suggested that errors transgressing "constitutional norm[s]," or even statutory rights, may still require reversal per se. *Id.* at 764-765.

2. In the wake of *Kotteakos*, it was still presumed that constitutional errors mandated reversal per se. 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 855, at 325 (1982). But in *Chapman* v. *California*, this Court concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and



insignificant that they may, consistent with the Federal Constitution, be deemed harmless." 386 U.S. at 22. The Court did not, however, equate "unimportant and insignificant" constitutional errors with the pre-existing concept of "technical" errors.[5] To the contrary, the Court held that even "insignificant" constitutional errors warranted placing the burden on the prosecution to prove "beyond a reasonable doubt" that the error did not contribute to the verdict:

> Certainly error, constitutional error * * * casts on someone other than the person prejudiced by it a burden to show that it was harmless. It was for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

386 U.S. at 24.

The Court's insistence that the prosecution disprove the harmfulness of a constitutional error is consistent with the common law and statutory tradition it invoked, and suggests strongly that constitutional errors are never technicalities. Trivial errors that by their nature do not tend to compromise substantial rights do not rise to the level of constitutional error. See, *e.g.*, *Perry* v. *Leeke*, 488 U.S. 272 (1989). But when a defendant can show that his trial was infected by an error of constitutional magnitude, the burden should fall on

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[5] *Chapman* alludes to 28 U.S.C. § 2111, the statutory successor to 28 U.S.C. § 391. Although § 2111 deleted the term "technical" from the statute, it "did not alter the substantive legal test" (*United States* v. *Lane*, 474 U.S. 438, 454 (1986) (Brennan, J., concurring in part and dissenting in part)) requiring the prosecution to show that an error did not affect a defendant's substantial rights. See also *Brecht*, 113 S. Ct. at 1718 n.7.

the State to justify the continued imprisonment of a person whose fundamental protections were violated.

## III. THE *BRECHT* DECISION DID NOT DISTURB THE LONGSTANDING PRINCIPLE THAT THE STATE BEARS THE BURDEN OF SHOWING THAT A CONSTITUTIONAL ERROR WAS HARMLESS

1. In *Brecht*, the Court limited use of the *Chapman* "beyond a reasonable doubt" harmless-error standard to cases arising on direct review, holding that the "less onerous standard" articulated in *Kotteakos* is appropriate for collateral review of constitutional errors. 113 S. Ct. at 1721-1722.[6] Quoting *Kotteakos*, the Court stated that in habeas corpus proceedings the new standard for evaluating constitutional errors was "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 1722.

The Court in *Brecht* fully incorporated the *Kotteakos* doctrine for collateral review of constitutional errors, and acknowledged that *Kotteakos* "is grounded in the federal harmless-error [statute] (28 U.S.C. § 2111)." 113 S. Ct. at

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[6] A principal justification for employing a lower standard on collateral review is that the state courts will already have applied the *Chapman* test on direct review, requiring the State to demonstrate beyond a reasonable doubt that the constitutional error did not contribute to the verdict. *Brecht*, 113 S. Ct. at 1721 ("it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review"). But when the state courts have failed to use the *Chapman* test, federal habeas courts must use the *Chapman* standard rather than the *Kotteakos* standard to assure adequate protection to a criminal defendant's constitutional rights. *Orndorff* v. *Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993), cert. denied, 62 U.S.L.W. 3701 (U.S. April 25, 1994) (No. 93-1012).



1722. Indeed, as the Court explicitly stated, a principal benefit of adopting the *Kotteakos* analysis in habeas proceedings is that "federal courts may turn to an existing body of case law in applying it." *Ibid.* Consequently, the logic of the Court's decision imports into harmless-error analysis on collateral review not only the legislative purposes reflected in that case law, but also the prosecution's burden of showing that an error was harmless.

Foremost among the policies governing federal harmless-error review is the need to preserve the "historic securities" that protect persons accused of crimes. *Kotteakos*, 328 U.S. at 762. Thus, under *Kotteakos*, the *only* time a defendant must bear the burden of showing that an error was harmful is when the asserted error was a mere "technicality," that is, if it "concerned * * * the mere etiquette of trials [or] the formalities and minutiae of procedure." *Bruno*, 308 U.S. at 294. In all other cases, when the nature of the error implicates substantial rights, the State must prove that a conviction should stand despite the presence of error.

The vast majority of the errors cognizable in habeas corpus proceedings are federal constitutional errors, which implicate issues that transcend trial "etiquette" or procedural minutiae. Indeed, the protections guaranteed by the Constitution represent "a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968). Violations of constitutional norms naturally tend to affect a defendant's substantial rights. *Kotteakos*, 328 U.S. at 764-765. It is for this reason that Justice Stevens observed correctly that "[a] constitutional violation, of course, would never fall into the 'technical' category" under *Kotteakos* (*Brecht*, 113 S. Ct. at 1723-1724 (concurring opinion)), and thus could never justify forcing the aggrieved party to demonstrate the harm. Thus, the *Kotteakos* standard as adopted in *Brecht* still "places the burden on prosecutors to explain why [constitutional] errors

were harmless" (*id.* at 1723) and accords with the historic harmless-error doctrine.

2. An opinion handed down only days after *Brecht* confirms that the beneficiary of an error generally bears the burden of disproving harm. In *United States* v. *Olano*, 113 S. Ct. 1770 (1993), the Court discussed the difference between "harmless error" under Fed. R. Crim. P. 52(a) and "plain error" under Fed. R. Crim. P. 52(b). Although both provisions consider the impact of an error on "substantial rights," the difference arises with regard to the burden of persuasion. Thus, the prosecution "bears the burden of persuasion with respect to prejudice" under the harmless-error rule, but the burden shifts to the defendant when an objection was not properly preserved at trial and the asserted error is therefore reviewed for plain error under Rule 52(b) (113 S. Ct. at 1778):

> This burden-shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: while Rule 52(a) precludes error-correction only if the error "does *not* affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights."

The decision in *Olano* is particularly instructive in the present context because the Court tied the burden of persuasion to the language of Rule 52(a), which is identical to the language in the federal harmless-error statute construed in *Kotteakos*. This Court has noted the similarities in history and language between Rule 52(a) and 28 U.S.C. § 2111, and has "[i]nvok[ed] the *Kotteakos* test" in holding that Rule 52(a) requires reversal when an error "had substantial and injurious effect or influence in determining the jury's verdict." *United States* v. *Lane*, 474 U.S. at 449 (quoting *Kotteakos*, 328 U.S.



at 776).[7] By stating clearly that the prosecution bears the burden of showing that an error did not affect substantial rights, this Court reaffirmed the traditional harmless-error analysis and burden allocation. Thus, *Olano* confirms the correctness of Justice Stevens' statement in his *Brecht* concurrence that *Brecht* did not invert the burden of persuasion under *Kotteakos* when it adopted that test for collateral review.

3. Despite the clear rule under *Kotteakos* that the prosecution must demonstrate the harmlessness of all but technical errors, the courts of appeals are divided — even among panels within the same circuit — over which party bears the burden of persuasion with respect to constitutional errors under *Brecht-Kotteakos*. Significantly, many courts (including panels that have delved beneath the surface of *Brecht* and have grappled with the holding of *Kotteakos* itself) have concluded that the burden of persuasion still lies with the prosecution to show that constitutional error was harmless. *United States* v. *Savage*, 1994 WL 121003, *5 n.3 (4th Cir. April 11, 1994); *Ortiz* v. *Dubois*, 19 F.3d 708 (1st Cir. 1994); *Stoner* v. *Sowders*, 997 F.2d 209, 213 (6th Cir. 1993); *Lowery* v. *Collins*, 996 F.2d 770, 772 (5th Cir. 1993); *Sherman* v. *Smith*, 1993 WL 433317, *4.

By contrast, those decisions that have reversed the burden of persuasion contain no analysis of *Kotteakos* and give no consideration to the historic principle that the prosecution bears the burden of persuasion with respect to all but "technical" errors. Instead, they simply recite a dictum from the *Brecht* opinion (113 S. Ct. at 1722) to the effect that

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[7] See also *Lane*, 474 U.S. at 454-455 (Brennan, J., concurring in part and dissenting in part) (the federal harmless-error statute was "incorporated" into Rule 52(a)); Advisory Committee's Notes on Fed. R. Crim. P. 52(a), 18 U.S.C. App., p. 657 (Rule 52(a) is a "restatement of existing law," citing the harmless-error statute).

habeas petitioners are not entitled to relief unless "they can establish" that the constitutional error was harmful. See, *e.g.*, *Kyles* v. *Whitley*, 5 F.3d 806, 818 (5th Cir. 1993) (dictum), cert. granted, 62 U.S.L.W. 3705 (U.S. April 25, 1994) (No. 93-7927); *Tague* v. *Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993); *O'Neal* v. *Morris*, 3 F.3d at 145; *Castillo* v. *Stainer*, 997 F.2d 669, 669 (9th Cir. 1993), modifying 983 F.2d 145 (9th Cir. 1992); *Cumbie* v. *Singletary*, 991 F.2d 715, 724 (11th Cir.), cert. denied, 114 S. Ct. 650 (1993). That one phrase, which does not appear to be a considered decision of the question or to affect the actual holding in *Brecht* that the error was harmless, should not be read to alter *sub silentio* a central ingredient of the *Kotteakos* analysis that the Court affirmatively adopted, nor should it be interpreted to annul the long tradition of allocating the burden of persuasion in accordance with the distinction between technical errors and errors (such as constitutional errors) that tend to affect substantial rights. See *Kokkonen* v. *Guardian Life Insurance Co. of America*, 62 U.S.L.W. 4313, 4315 (U.S. May 16, 1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."); *U.S. National Bank of Oregon* v. *Independent Insurance Agents*, 113 S. Ct. 2173, 2186 n.11 (1993) (remark in prior opinion was "obviously not controlling, coming as it did in an opinion that did not present" the issue addressed by the remark); see also note 2, *supra*.

A more plausible construction is that the phrase "they can establish that it resulted in 'actual prejudice'" does not refer to a burden of persuasion; rather, it merely indicates that the reviewing court must find that the verdict could have been affected by the constitutional error. The application of the *Kotteakos* standard in *Brecht* supports this reading. The Court's factual analysis mirrored the traditional *Chapman* approach of inquiring whether the prosecution's evidence against the defendant was sufficiently "overwhelming" to sustain the tainted conviction, but the Court applied the "less



onerous" *Kotteakos* standard in making that determination. 113 S. Ct. at 1722-1723 ("the State's evidence of guilt was, if not overwhelming, certainly weighty"). The Court concluded as a matter of federal law that the *Doyle* error was harmless (*ibid.*), but its analysis did not reflect that it had followed its own dictum by assigning the burden of persuasion to the petitioner. See *Elder* v. *Holloway*, 114 S. Ct. 1019, 1023 (1994) (remark in prior opinion that a defendant must "show" violation of clearly established federal right did not impose a burden on defendant to cite dispositive case law; whether federal right was clearly established is for reviewing courts to determine as a matter of law).

## IV. REVERSING THE HISTORIC PRINCIPLE THAT THE PROSECUTION MUST SHOW THAT NON-TECHNICAL ERRORS WERE HARMLESS WOULD UNDERMINE THE RELIABILITY OF CRIMINAL JUDGMENTS

1. The integrity of the judicial system requires courts to be especially sensitive to the danger that a criminal defendant may have been prejudiced by an error at trial. That principle holds added force when there is "the possibility that a[ ] [constitutional] error may have caused the conviction of an * * * innocent person." *Brecht*, 113 S. Ct. at 1729 (O'Connor, J., dissenting). In a criminal trial, far more is at stake than money or property rights; the defendant's freedom — and sometimes his life itself — is on the line. Therefore it is a particularly serious matter when constitutional error clouds a criminal trial. Rights such as a defendant's ability to confront all the witnesses against him or her, a public trial by an impartial jury, and due process of law go to the heart of the criminal justice system and simply cannot be equated with "technical" errors such as misspelled words in an indictment. Without an "appropriately demanding" showing by the party benefiting from the error that the error did not have an injurious effect or influence on the verdict (*Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring)), one cannot be

confident that the trial nevertheless yielded a just verdict. *Rose* v. *Clark*, 478 U.S. at 577-578 ("Without [constitutional] protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.") (citation omitted).

In cases in which the burden of persuasion actually matters, the courts are by definition in some doubt about whether a proven constitutional error had a substantial and injurious impact or influence on the trial. This Court has historically been loath to allow such doubts to be resolved in the State's favor. See, *e.g.*, *In re Winship*, 397 U.S. 358, 363, 364 (1970) (the interests at stake in a criminal case are of "immense importance" and "transcending value," so that it is "critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"); *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (discussing necessity to "exclude as nearly as possible the likelihood of an erroneous judgment" in criminal cases because of the liberty interests at stake). To be sure, respect for and confidence in the judiciaries of the various States led this Court in *Brecht* to lower the *standard* by which one determines an error to be harmless. But it simply makes no sense for the prosecution to prevail and a conviction to stand when, even under that lowered standard, the proof is in equipoise as to whether the proven error did affect the defendant's substantial rights.

Habeas review is the last opportunity for a defendant to contest a wrongful conviction that stemmed from constitutional error. A habeas proceeding will be affected by the holding in this case only if it is already established (1) that the defendant preserved a federal constitutional claim in state court (see *Coleman* v. *Thompson*, 501 U.S. 722 (1991)); (2) that the constitutional claim was meritorious; (3) that precedent in existence at the time the defendant's conviction became final *dictated* a holding in the defendant's



favor on the federal constitutional issue (see *Gilmore* v. *Taylor*, 113 S. Ct. 2112, 2116 (1993)), and (4) that the question of prejudice from the constitutional error is sufficiently grave that the allocation of the burden of persuasion may make a difference. In those circumstances, there is no reason to turn tradition on its head by forcing the defendant — already the victim of constitutional error — to demonstrate further harm.

2. The situation presented in amicus Timothy Sherman's case illustrates the need to maintain the tradition of placing the burden on the prosecution to demonstrate that a constitutional error was harmless. Despite the complete absence of evidence of motive or direct evidence that he was the killer, Timothy Sherman was convicted of murdering his parents in their sleep with a shotgun. As the Fourth Circuit's opinion indicates, the case against him was entirely circumstantial and suffered many weaknesses. 1993 WL 433317, *2. Certain "key evidence" against Mr. Sherman was the discovery of the murder weapon in a neighborhood pine tree. That evidence, however, was equivocal at best, because there was considerable evidence — described in the Fourth Circuit's opinion (*ibid.*) — that tended to contradict the premise that Mr. Sherman would have been physically able to lodge the gun in the tree in the condition in which it was found. For this reason, both the prosecution and the defense presented extensive evidence about the physical characteristics of the pine tree and of the crime scene.

Unbeknownst to the trial court or the parties, one member of the jury decided that he needed to obtain more evidence about the tree and the neighborhood than had been presented at trial. To gain that additional evidence, the juror went "to the Sherman house and then * * * drove back the streets from the Sherman house * * * looking for a tree that was so involved in the case." 1993 WL 433317, *2. The juror visually inspected both the house and the pine tree, and other jurors have provided affidavits indicating that Miller

shared the information he learned with them. The Fourth Circuit properly recognized that the juror's escapade violated Mr. Sherman's constitutional rights. *Id.* at *3; see, *e.g.*, *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965).

The site visit in Mr. Sherman's case posed particularly grave dangers because the object of the juror's investigations was a central piece of evidence in the case, whose physical characteristics were hotly contested at trial. But the record cannot reflect what impressions the juror gained from his unsupervised inspection, because Maryland courts, like federal courts (see Fed. R. Evid. 606(b)), will not allow a juror's thought processes to be examined. See 1993 WL 433317, *2.

It is entirely possible in Mr. Sherman's case that the ill-gotten evidence influenced the jury's determination. Yet the rules of evidence severely hamstring his ability to *prove* that point, if it is he who must bear the burden. Thus, although we are arguing that Mr. Sherman should prevail under any standard, a court might construe the impenetrable uncertainty surrounding the impact of the site visit on the juror's deliberations to cause a failure in carrying the burden of persuasion. The risk of error is high. The proper approach to these issues dictates that the State — not the constitutionally wronged defendant — bear that risk. See *Stockton* v. *Virginia*, 852 F.2d 740, 743-744 (4th Cir. 1988) (Wilkinson, J.), cert. denied, 489 U.S. 1071 (1989).



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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